

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT EDWARD COLBY,

Defendant-Appellant.

UNPUBLISHED

June 9, 2000

No. 215666

Kent Circuit Court

LC No. 98-005813-FH

Before: Jansen, P.J., and Hoekstra and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of involuntary manslaughter, MCL 750.321; MSA 28.553. The trial court sentenced him as a third habitual offender, MCL 769.11; MSA 28.1083, to serve a term of ten to thirty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court violated the concept of proportionality in imposing a sentence of ten to thirty years' imprisonment. We disagree. When reviewing a challenge to the proportionality of the sentence imposed on an habitual offender, this Court is limited to determining whether the lower court abused its discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). An abuse of discretion will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Our Supreme Court has stated that "a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society." *Hansford, supra* at 326.

As a third felony offender whose underlying conviction was punishable by up to fifteen years' imprisonment, defendant could be sentenced to the legislatively set maximum term of thirty years. MCL 769.11(1)(a); MSA 28.1083(1)(a). As indicated in the presentence investigation report, defendant, at twenty-seven years of age, has an extensive criminal record which spans his entire adult life and centers around his admitted abuse of alcohol. Included within this history are two felony convictions for operating a motor vehicle under the influence of alcohol (OUIL) as well as numerous misdemeanor

convictions. With respect to defendant's potential for rehabilitation and ability to conform his conduct to the law, we note that defendant has a history of probation failure and was on parole from his felony OUIL convictions when he committed the instant offense outside a local tavern after a night of heavy drinking. The record reveals that the trial court duly considered these factors and their connection to the instant offense in fashioning defendant's sentence. The court particularly noted that the victim was struck a fatal blow while merely trying to break up a fight that had been started by defendant's companion. In view of the circumstances involved and the offense committed, we believe that defendant's sentence was proportionate.

Defendant next challenges the sufficiency of the evidence to support his conviction of involuntary manslaughter. In reviewing claims of insufficiency of the evidence to sustain a verdict, this Court views the evidence in the light most favorable to the prosecution to determine if a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Godbold*, 230 Mich App 508, 522; 585 NW2d 13 (1998). Involuntary manslaughter is defined as the killing of another without malice and unintentionally, but (1) in doing some unlawful act neither amounting to a felony nor naturally tending to cause death or great bodily harm, or (2) in negligently doing some act lawful in itself, or (3) by the negligent omission to perform a legal duty. *People v Datema*, 448 Mich 585, 595-596; 533 NW2d 272 (1995). Thus, within the definition of involuntary manslaughter there are three different theories that can lead to a conviction. Under the theory argued in this case, the prosecution was required to show conduct by defendant that amounted to an unlawful act, committed with the intent to injure or in a grossly negligent manner, that proximately caused the death of Richard Bumstead. *Id.* at 606; see also CJI2d 16.10.

On appeal, defendant does not argue that the evidence was insufficient to establish that he intentionally and unlawfully struck the blow that ultimately resulted in Bumstead's death. Rather, defendant asserts that the evidence was insufficient to find him guilty of involuntary manslaughter because the victim's development of pneumonia while in the hospital and the family's subsequent decision to remove life support were intervening causes that relieve him from responsibility for the death. We disagree.

Initially, we note that the family's decision to withdraw life support is not evidence properly before this Court. No evidence of the family's decision to discontinue life support was presented at trial, nor is any such evidence contained in the lower court record. See MCR 7.210. However, on appeal defendant has presented this Court with a copy of the medical examiner's report that indicates that on April 9, 1998, after being informed of the poor prognosis for recovery and the anticipation of brain death, Bumstead's family did choose to cease all life support, after which Bumstead expired. Nonetheless, as more fully explained below, the decision to remove life support was not an intervening cause relieving defendant of responsibility for the death.

The determination of proximate cause or of the existence of an independent intervening cause of death is an issue for the jury. *People v Clark*, 171 Mich App 656, 659; 431 NW2d 88 (1988). In this case, forensic pathologist Dr. Stephen Cohle testified that Bumstead's death was caused by brain injuries suffered as result of the victim's head abruptly striking a hard surface. Cohle further indicated that these fatal injuries were consistent with the testimony of several witnesses, including that of

defendant, that established that Bumstead fell backwards and struck his head on the sidewalk after defendant struck him in the face. With respect to pneumonia, Cohle indicated that this is a fairly common complication for someone who has a tube in his airway for any length of time and that in this case, the insertion of a tube into Bumstead's airway was necessary for the continuation of his life. Cohle also testified that despite the onset of pneumonia, the injuries to the brain suffered by Bumstead in the fall were the primary cause of death. Cohle's testimony was the only evidence relating to the cause of death that was produced at trial and was certainly sufficient to allow a rational trier of fact to conclude that defendant's conduct proximately caused Richard Bumstead's death.

Moreover, this Court has recently held that discontinuance of life support is not an intervening cause that breaks the connection between the defendant's actions and the victim's death. *People v Bowles*, 234 Mich App 345, 350-351; 594 NW2d 100 (1999), *aff'd* *People v Bowles*, ___ Mich ___, ___ NW2d ___ (Docket No. 114661, decided 3/28/00) slip op p 6. Such action "merely allows the patient's injury or illness to take its natural and inevitable course." *Bowles, supra* at 351, quoting *In re Rosebush*, 195 Mich App 675, 692; 491 NW2d 633 (1992).

Defendant also argues that the evidence supporting his conviction was insufficient inasmuch as the prosecution presented perjured and inconsistent testimony. Defendant's argument stems from the testimony of a prosecution witness who viewed the assault on Richard Bumstead from her home located across the street from the bar. While testifying, this witness admitted that in her initial statements to police she had lied about portions of the incident, exaggerating defendant's involvement. The witness, however, also testified that despite her initial distortion of the facts, her testimony at trial was truthful. Although it is apparent that the witness did lie to police before trial, there is no indication that she lied while under oath during trial or that the prosecutor improperly attempted to conceal her inconsistent statements to police in order to obtain a conviction. See, e.g., *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Therefore, we reject defendant's claim as lacking merit.

Similarly, we reject defendant's claim that the evidence produced at trial was insufficient to support his conviction because of inconsistencies in the testimony of prosecution witnesses. Even assuming the validity of defendant's general allegation of inconsistent testimony, we note that such inconsistencies go to the weight of the evidence adduced at trial, not to its sufficiency. *People v Smith*, 205 Mich App 69, 72 n 1; 517 NW2d 255 (1994). When addressing an issue concerning the sufficiency of evidence, this Court will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). Accordingly, we find that the evidence at trial was sufficient to support defendant's conviction of involuntary manslaughter for the death of Richard Bumstead.

Defendant next argues that the trial court abused its discretion in granting his codefendant's motion to sever trials. Again, we disagree. Defendant's argument is based upon the erroneous conclusion that a trial court, under MCR 6.121, may only grant separate trials where the moving party has established, through affidavit or other offer of proof, that his substantial rights will be prejudiced through antagonistic defenses. According to defendant, because his codefendant failed to provide the trial court with any proof that the codefendants would be presenting prejudicially antagonistic defenses, its decision to sever trials was error. However, while severance is mandatory "on a showing that

severance is necessary to avoid prejudice to substantial rights of the defendant,” MCR 6.121(C); *People v Anderson*, 166 Mich App 455, 481; 421 NW2d 200 (1988), where severance is not required, the court retains discretion to sever on the ground that severance is appropriate to promote a fair determination of the guilt or innocence of one of the defendants. See MCR 6.121(D); *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994). Factors relevant to a discretionary decision to sever under MCR 6.121(D) include the potential for confusion or prejudice stemming from the complexity or nature of the evidence.

Here, while noting that there “may be some inherent problem” with antagonistic defenses, the trial court primarily based its decision to sever trials upon its conclusion that jury confusion would result from the anomalous manner in which the codefendants had been charged. As charged, defendant could be convicted of involuntary manslaughter for the death of Richard Bumstead even though he never intended to harm the victim. However, his codefendant, who had been charged with the lesser crime of assault with intent to do great bodily harm, must have been shown to possess a specific intent to harm. The trial court found that the idea that the codefendant facing the lesser charge must have actually entertained a more serious intent was “likely to excite some difficulty among members of a competent jury panel.”

We agree with the trial court that under the circumstances the potential for jury confusion was substantial. Accordingly, we find the trial court did not abuse its discretion when it granted the motion to sever. Moreover, even assuming the trial court erred in allowing separate trials, defendant has failed to allege how such error necessitated relief. See MCL 769.26; MSA 28.1096. Holding separate trials did not foreclose defendant’s ability to produce evidence at his trial concerning his codefendant’s involvement in the assault upon the deceased, and thus we find no prejudice resulting from the disputed decision.

Defendant’s final argument on appeal is that the jury verdict was against the great weight of the evidence. Defendant makes this argument in his second supplemental brief to this Court, which he filed pursuant to a motion granted by this Court at the same time this Court granted his motion to substitute counsel. However, because defendant did not make a timely motion for a new trial below, this issue is unpreserved.¹ *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). In any event, our review of the record indicates that the evidence in this case does not clearly preponderate against the verdict. *People v Lemmons*, 456 Mich 625, 642; 576 NW2d 129 (1998).

Affirmed.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

/s/ Jeffrey G. Collins

¹ We note that defendant attempted to preserve this issue by filing a motion for a new trial in the trial court the same day that he filed his second supplemental brief in this Court. However, MCR 7.208(B)(1) provides that a postjudgment motion for a new trial may be filed “[n]o later than 56 days after the commencement of the time for filing the defendant-appellant’s brief as provided by MCR

7.212(A)(1)(a)(iii). . .” Here, defendant did not file his motion for a new trial within the time allotted by MCR 7.212(A)(1)(a)(iii) for filing his brief on appeal. Although the rule provides an alternative time frame for filing a brief where “substitute counsel is appointed for the defendant,” that alternative is not applicable in this case because, among other things, defendant’s substitute counsel was retained and not appointed by the trial court. Under these circumstances, the trial court was without jurisdiction to hear defendant’s motion for a new trial.